DOCKET NO. LND CV-17-6082593-S	:	SUPERIOR COURT
SIXTY FIVE MARSH HILL ROAD, LLC	:	LAND USE LITIGATION DOCKET
V.	:	
ORANGE TOWN PLAN AND ZONING COMMISSION	: :	AT HARTFORD FEBRUARY 19, 2019

MEMORANDUM OF DECISION

I

The plaintiff, Sixty Five Marsh Hill Road, LLC, appeals the denial by the defendant, the Orange Town Plan and Zoning Commission (commission), of an application for a special permit for an affordable housing development under General Statutes § 8-30g. The plaintiff sought to develop its 3.03 acre property at 65 and 69 Marsh Hill Road and 0 and 15 Salemme Lane in Orange as a mixed use development of commercial and residential components in a light industrial district (LI-2) zone. (Return of Record [ROR], Item 13, p. 74[1]; Item 65.) The commission held a public hearing on February 21, 2017, March 21, 2017, April 4, 2017, and April 18, 2017, and denied the application on May 2, 2017. (ROR, Item 39; Items 73.a-73.d; Supplemental [Supp.] ROR, Pleading [Pl.] # 107.00, Item 72.e.) Notice of the decision was evidently published on

[1] The items in the record are not consistently paginated. For ease of reference, the page numbers refer to the overall page number in the electronically filed document. For example, pleading # 105.00 contains most of the return of record and has 922 pages. Thus, the court will refer to pages 1 through 922. This will also apply to the two supplements to the return of record that will be referred to as supplemental return of record, pleading # 106.00, and supplemental return of record, pleading # 107.00.

112.00

May 9, 2017, in the New Haven Register. (ROR, Item 43.)

On May 23, 2017, the plaintiff filed a proposed modification to the application under General Statutes § 8-30g (h).[2] (ROR, Item 43.) The commission held a public hearing on the modified application on July 18, 2017, and August 1, 2017, and voted to deny the second application on August 15, 2017. (Supp. ROR, Pl. # 106.00, Items 73.f-73.g; Supp. ROR, Pl. # 107.00, Item 65; Item 72.h.) In the denial, the commission found that the plaintiff's application did not fall under § 8-30g as it contained mixed uses. (Supp. ROR, Pl. # 107.00, Item 65.) It also found that the industrial use exemption of General Statutes § 8-30g (g) (2) (A) applied because the application proposed a residential use on property in an industrial zone and the Orange Zoning Regulations (regulations) did not allow residential use in the LI-2 zone. (Supp. ROR, Pl. # 107.00, Item 65.) Notice of the decision was apparently published on August 24, 2017. (ROR, Item 66.)

On the same date, the plaintiff commenced this appeal alleging that the commission's reasons for denial are illegal, arbitrary and in abuse of its discretion. The commission filed the

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[2] Section 8-30g (h), in relevant part, provides: "Following a decision by a commission to reject an affordable housing application . . . the applicant may, within the period for filing an appeal of such decision, submit to the commission a proposed modification of its proposal responding to some or all of the objections or restrictions articulated by the commission, which shall be treated as an amendment to the original proposal. . . . The filing of such a proposed modification shall stay the period for filing an appeal from the decision of the commission on the original application. The commission shall hold a public hearing on the proposed modification if it held a public hearing on the original application and may hold a public hearing on the proposed modification if it did not hold a public hearing on the original application. . . . Within the time period for filing an appeal on the proposed modification as set forth in section 8-8, 8-9, 8-28 or 8-30a, as applicable, the applicant may appeal the commission's decision on the original application and the proposed modification in the manner set forth in this section. Nothing in this subsection shall be construed to limit the right of an applicant to appeal the original decision of the commission in the manner set forth in this section without submitting a proposed modification or to limit the issues which may be raised in any appeal under this section."

return of record on March 14, 2018, and filed supplemental returns of record on April 6, 2018, and on June 27, 2018. The commission filed its brief on June 29, 2018, the plaintiff filed its brief on September 17, 2018, and the commission filed its brief in reply on October 25, 2018. The court heard the appeal on October 31, 2018.

II

Before this court on October 31, 2018, the plaintiff introduced four deeds, without objection, demonstrating ownership of the subject properties. Exhibits 1-4. Additionally, Frank M. Dilieto, the managing partner of the plaintiff, testified that the plaintiff owned the property and was the applicant throughout the administrative proceeding and owns the property presently. Therefore, this court found that the plaintiff was aggrieved. See General Statutes § 8-30g (f) ("[a]ny person whose affordable housing application is denied . . . may appeal such decision pursuant to the procedures of this section"); see also *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 527, 119 A.3d 541 (2015) ("[i]t is well established that a party may be aggrieved for purposes of appeal by virtue of its status as a property owner").

III

The plaintiff's proposed development, to be known as Marsh Hill Station, includes 23,641 square feet of commercial or office space with a residential component of sixty apartments of which 30 percent, or eighteen units, would be set aside as affordable housing under § 8-30g. (ROR, Item 5.) Two buildings would have four and one-half stories with underground parking, commercial space on the first floor and residences on the three floors above. (ROR, Item 74.) According to the modified plans, the plaintiff proposed that the commercial space would perhaps be occupied by offices, restaurants and a gym. (Supp. ROR, Pl. # 106.00, Item 73.f, pp. 29-32.)

In the commission's denial of the plaintiff's application, the commission gave two reasons for its denial: (1) § 8-30g did not apply to the plaintiff's mixed use application and (2) the industrial use exemption of § 8-30g (g) (2) (A) would apply. Specifically, the commission found: "The Affordable Housing Statute does not address uses other than residential uses, and the retail/restaurant uses contemplated by the Modified Application are not permitted in the LI-2 zone. Consequently, the Applicant's attempt to classify its application for a mixed use development as an Affordable Housing Application is an improper attempt to bootstrap non-permitted commercial uses to a [§] 8-30g application. . . . The Commission concludes that the Applicant has filed an improper Affordable Housing Application. The Applicant cannot avail itself of the benefit of Section 8-30g scrutiny and review when it is clear that the commercial uses proposed by the Modified Application are prohibited in the LI-2 zone."[3] (Supp. ROR, Pl. # 107.00, Item 65, pp. 8-9.)

The commission also found that "substantial evidence in the record demonstrates that the property which is the subject of the Modified Application is located in an area which is zoned for industrial use and which does not permit residential uses. Furthermore, as the Applicant conceded, it is not seeking approval for assisted housing. Consequently, the 'industrial use exemption' set forth in . . . General Statutes [§] 8-30g (g) (2) (A) applies. The Modified Application does not conform to the Zoning Regulations as it seeks approval for uses which are not permitted in the LI-2 zone." (Supp. ROR, Pl. # 107.00, Item 65, pp. 7-8.)

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[3] The decisions denying both applications are essentially the same. (ROR, Item 42; Supp. ROR, Pl. # 107.00, Item 65.)

A

The threshold issue is whether § 8-30g applies to the plaintiff's mixed use application. The plaintiff argues that the statute does not prohibit mixed uses or commercial uses. The commission counters that there is no language in § 8-30g indicating legislative intent to include any uses other than residential.

"Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citation omitted; internal quotation marks omitted.) *Dauti Construction, LLC* v. *Planning & Zoning Commission*, 125 Conn. App. 665, 677, 10 A.3d 92 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011).

In § 8-30g (a) (2), "affordable housing application" is defined as "any application made to a commission in connection with an affordable housing development by a person who proposes to develop such affordable housing." In § 8-30g (a) (1), "affordable housing development" is defined as "a proposed housing development which is (A) assisted housing, or (B) a set-aside development." "Set-aside development" is defined as "a development in which not less than thirty per cent of the *dwelling units* will be conveyed by deeds containing covenants or restrictions which shall require that, for at least forty years after the initial occupation of the proposed development, such *dwelling units* shall be sold or rented at, or below, prices which will preserve

the units as housing for which persons and families pay thirty per cent or less of their annual income, where such income is less than or equal to eighty per cent of the median income. In a set-aside development, of the *dwelling units* conveyed by deeds containing covenants or restrictions, a number of *dwelling units* equal to not less than fifteen per cent of all *dwelling units* in the development shall be sold or rented to persons and families whose income is less than or equal to sixty per cent of the median income and the remainder of the *dwelling units* conveyed by deeds containing covenants or restrictions shall be sold or rented to persons and families whose income is less than or equal to eighty per cent of the median income." (Emphasis added.) General Statutes § 8-3g (a) (6).

"Dwelling" is defined as "a shelter (as a house) in which people live."[4] Merriam-Webster's Collegiate Dictionary (10th Ed. 1999). It does not connote an industrial or commercial use. Thus, the clear and unambiguous language of the statute only applies to applications to develop residential uses.

Additionally, interpreting § 8-30g to apply to mixed uses may lead to an absurd result as illustrated by *Cortese* v. *Planning & Zoning Commission of the Town of Greenwich*, Superior Court, judicial district of New Britain, Docket No. CV-00-0505690-S (September 5, 2002, *Munro, J.*).[5] If § 8-30g were interpreted to allow for mixed uses, a commission would be

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[4] "Dwelling unit" is also defined in § 383-14 of the regulations as "[a] building or part of a building designed for occupancy, or so occupied by one family. Accommodations occupied for transient lodging in a hotel or a motel shall not be considered to be a dwelling unit." (ROR, Item 75, p. 794.)

[5] As support for the plaintiff's argument, it cites to *Cortese*. In *Cortese*, the court stated, "The legislature, in all of its amendments of the affordable housing legislation, has never imposed a minimum number of units, nor a prohibition on a mixed use application for a § 8-30g housing development. Accordingly, this court should not read a minimum requirement or a restriction on

required to apply the statute in its review of permits to construct or enlarge industrial or commercial uses if developers included an affordable dwelling unit. Such an interpretation is not what the legislature intended.

The court is mindful that "the statute's legislative history reveals that the key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 511, 636 A.2d 1342 (1994). In *West Hartford Interfaith Coalition,* the court held that "[a]part from requiring that an application be made in connection with an affordable housing development proposal, the statute contains no exceptions or qualifications limiting the definition of an affordable housing application to certain types of applications to zoning commissions." Id., 508-509. The court construed "the language of § 8-30g to apply to every type of application filed with a commission in connection with an affordable housing proposal."[6] Id., 509.

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use of the property where it has not been implied by the legislature." Id. Nevertheless, the court also observed, "The commission denied the applications primarily because they perceived it as an attempt to bootstrap an illegal expansion of a nonconforming use through the construction of an affordable housing unit that would be set in a commercial environment inappropriate to its residential character. Further it found it unhealthful for the residents. The affordable unit was to be placed over the garage where nine fuel oil trucks were to be serviced, parked, repaired and dispatched." Id. The court concluded, "Essentially, the unit sought for affordable housing was an excuse by the Applicant to avail itself of the benefit of § 8-30g scrutiny and review when it knew that its otherwise commercial application had been and would likely be again looked upon unfavorably. The court finds this an abuse of the purposes and goals of the affordable housing legislative scheme." Id.

[6] Typically, this has been construed to allow for zone changes related to affordable housing proposals. See, e.g., *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 314-15, 655 A.2d 1146 ("Whichever zoning authority is asked to deal with the application, a zone change will necessarily be embodied in the application, either as to use, or as to bulk, as is the case here. If no zone change were involved, there would be no need for an application for affordable housing. An application may not be rejected just because it involves a zone change."), cert. denied, 233 Conn. 909, 658 A.2d 981 (1995).

Nevertheless, there is a difference between types of applications versus types of uses. "The legislative history indicates that the legislature intended to accomplish th[e] goal [of encouraging and facilitating affordable housing throughout the state] by creating specific legislation that affects only affordable housing applications, not the overall zoning scheme. Therefore, *applications that do not fit into the definition of an affordable housing application are not affected by § 8-30g.*" (Emphasis added; internal quotation marks omitted.) *JAG Capital Drive, LLC* v. *East Lyme Zoning Commission*, 168 Conn. App. 655, 670, 147 A.3d 177 (2016).

As the plaintiff's proposal undisputedly includes nonresidential uses, it does not fit into the definition of an affordable housing application and the § 8-30g review process does not apply. See id. In denying the plaintiff's application, the commission cited § 383-67 (A) of the regulations which prohibits dwellings in the LI-2 zone. (ROR, Item 75, p. 822; Supp. ROR, Pl. # 107.00, Item 65, p. 5.) Therefore, the commission properly denied the application. See *Fedus* v. *Zoning & Planning Commission*, 112 Conn. App. 844, 850, 964 A.2d 549 ("when acting in an administrative capacity, a zoning commission's . . . function is to determine whether the applicant's proposed use is one which satisfies the standards set forth in the regulations and statutes" [internal quotation marks omitted]), cert. denied, 292 Conn. 905, 973 A.2d 104 (2009).

B

The commission's second reason for denying the plaintiff's application is based on the industrial use exemption of § 8-30g (g) (2) (A). The plaintiff argues that the exemption is not applicable because the commission's regulations provide for a transient oriented design district

(TODD) as an overlay district to this LI-2 zone.[7] In 2016, the commission granted an application for a zone change to the TODD that allowed a 700 car parking garage, a 200 unit residential facility and 20,000 square feet of commercial space on an adjoining parcel owned by the Orange Land Development, LLC.[8] (ROR, Item 13, p. 75.) The plaintiff asserts that the creation of the

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[7] Section 383-215 (A) provides: "The purpose of the Transit Oriented Development District is to create a high density mixed use, transit oriented development adjacent to a Metro North Rail Station. It is further the intent to provide a range of housing, businesses and services specifically geared towards commuters and users of the railroad, designed in an aesthetically pleasing, environmentally conscious and pedestrian scaled manner." (ROR, Item 75, p. 916.)

Additionally, Section 383-217, entitled "Permitted uses," provides:

"A. Retail uses, including retail banks, subject to the following:

"(1) All retail uses shall be supportive of the principal land uses within the TODD, including the railroad station, offices, hotels and multi-family residential uses.

"(2) The retail uses shall be designed to primarily serve the market of railroad station commuters, residents of the multi-family dwellings within the TODD, employees of the offices and/or hotels within the TODD, and guests of the hotels within the TODD. This shall be illustrated by size, type and signage of the proposed retail uses.

"(3) No retail uses shall exceed 5,000 square feet of building area.

"(4) All retail uses shall be within a building used primarily for one of the other permitted uses.

"(5) All retail uses shall be oriented to a public or private street, or other public space.

"B. Indoor restaurants and other food and beverage service establishments where customers are served only when seated at tables or counters and all of the customer seats are located within an enclosed building or outdoor area attached to the indoor dining area.

"C. Business and professional offices, including medical offices.

"D. Railroad transit stations.

"E. Structured parking.

"F. Multi-family residential units subject to the following conditions:

"(1) No unit shall contain more than two bedrooms.

"(2) No units shall be located on the ground floor of a structure.

"(3) There shall be a maximum of 250 units.

"(4) Multi-family residential units shall only be permitted in conjunction with the development of office, hotels or other similar uses. There shall be a minimum of 1,000 square feet nonresidential use for each residential dwelling unit. The Commission may require the phasing of development to assure that the minimum nonresidential development occurs prior to the residential development.

"G. Hotels with accessory restaurants and/or conference centers." (ROR, Item 75, p. 917.)

[8] According to the commission's decision, there was a moratorium on applications for zone changes to the TODD at the time of the plaintiff's applications. (Supp. ROR # 107.00,

TODD and the approval of the Orange Land Development application is fatal to the commission's denial of the plaintiff's application based upon the industrial zone exemption.[9] The commission counters that it properly denied the plaintiff's application under the industrial zone exemption because the plaintiff did not apply for a zone change to the TODD and its property is in an LI-2 zone that does not allow residential uses under the regulations.

In the commission's decision, it found the following: "The Orange Zoning Map depicts the TODD as an overlay zone which is an area designated as 'Potential Transit Development Area.' Accordingly, properties in the designated area *may* qualify for the TODD. It is not an existing zone. The TODD regulations, which are found in [§§] 383-215 through 383-220 of the [regulations], set forth a comprehensive and rigorous process,[10] which requires an applicant to

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Item 65, p. 7.) Even if the plaintiff had applied for a zone change to the TODD after the expiration of the moratorium, the cap of § 383-217 (F) (3) of the regulations would apparently have been construed to limit residential units to 250 in the TODD zone. (ROR, Item 75, p. 917; Supp. ROR, Pl. # 106.00, Item 73.f, pp. 38-40.) As Orange Land Development was already developing 200 units, the plaintiff would have only been able to develop 50 units instead of 60.

[9] Indeed, counsel before the commission argued that his "whole argument . . . is, that the creation of the TODD overlay creates a situation that negates the exemption under [§] 8-30g for prohibition of residential use." (Supp. ROR, Pl. # 106.00, Item 73.f, p. 92.)

[10] Section 383-220 provides:

"A. Informal consideration. It is recommended that, prior to the submission of a formal application for approval of a Transit Oriented Development District, the applicant review with the Commission and its staff in preliminary and informal manner any proposal for a TODD.

"B. Petition. A petition for a change of zone for the establishment of a Transit Oriented Development District shall be submitted to the Commission in writing and shall be signed by the owner or owners of all parcels within the proposed district, in accordance with the provisions of § 383-210, and shall be accompanied by the following:

"[Amended 11-19-2013]

"(1) Statement. A written statement specifying the proposed uses of the area, special design considerations and features, architectural guidelines and themes, and how the proposal is consistent with the purpose of the Transit Oriented Development District.

"(2) Conceptual plan. A conceptual plan shall be presented to the Commission showing the general intent of the proposal. The following information shall be presented in enough detail to allow the Commission to determine if the plan is in the spirit of the Zone's intent.

"(a) Location and size of property, including a boundary map and a map showing the project site in the context of the surrounding area.

"(b) Existing topographic grades of the property, shown in accordance of a minimum of five foot intervals.

"(c) Location of proposed buildings, roads, parking areas and structures, open space areas, including proposed general grading characteristics.

"(d) Plans for the construction of a rail station including funding sources.

"(e) General building and parking layout.

"(f) Proposed area and square footage of the proposed buildings and uses.

"(g) Concept plan for uses to be proposed which may not necessarily include specific tenants.

"(h) General vehicular and pedestrian circulation showing all proposed public and private drives, walking paths, sidewalks, and means of traffic calming and/or pedestrian safety.

"(i) Proposed public areas such as parks, lawn areas and recreational facilities.

"(j) Landscaping and lighting plans showing areas of existing mature trees, all existing and proposed surface water resources, proposed landscaping treatments, proposed open space and recreational areas, and detail of proposed pedestrian-scaled lighting fixtures to be used.

"(k) General streetscape and architectural design or theme, with exterior elevations, perspective drawings and descriptive information regarding building materials and exterior finishes.

"(3) Tentative construction timeline and phasing plan.

"(a) Existing and proposed utility plan.

"(b) Proposed grading of the property in a general concept, including the proposed amount of material which would be added, removed, and/or relocated on the property.

"(c) Traffic impact analysis, which describes the potential impact of the proposed uses on public roads, and, if needed, includes recommended improvements to such roads; and the adequacy and efficiency of the proposed internal circulation system. The Commission may request that the traffic impact be analyzed as to individual components of the overall plan.

"(4) Application fee. Fees shall be paid to amend the Zoning Map as set forth in § 270-1 of the Town Code with an additional fee for site plan as set forth in this section to be paid at the time of submission of detailed development plans once the Commission determines the concept plan is acceptable.

"C. Review of concept plan.

"(1) After the application submission has been deemed complete for the establishment of a Transit Oriented Development District, the Commission shall review the application for completeness of submission, and may require additional information. The complete application shall be reviewed at a public hearing and during this review may hold meetings with the petitioner and require additional information. The Commission shall hold a public hearing on the application.

apply for a zone change in order to establish a TODD. Once the zone change for a TODD is approved, property that formerly was in the LI-2 zone becomes part of the new TODD, which is its own, separate zone." (Emphasis in original.) (Supp. ROR, Pl. # 107.00, Item 65, p. 6.)

General Statutes § 8-30g (g) (2) (A), in relevant part, provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove . . . [that] the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses . . . . If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

In the present case, the commission must prove two things under the statute: (1) the area

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"(2) After the public hearing, the Commission may disapprove or give approval to the concept plan or approval subject to modifications. Approval of the concept plan shall not constitute final approval of the Transit Oriented Development District and shall simply authorize the submission of site plans setting forth in detail the specifics of the proposed development and showing any modifications specified by the Commission.

"D. Site plan. A site plan and application shall be submitted to the Commission as required by Article XIII of the Zoning Regulations. In addition to the plans required by Article XIII of the zoning regulations, the following shall also be submitted:

"(1) A pedestrian circulation plan showing safe, illuminated means of circulation throughout the site. Proposed material for pathways will be presented on a detail plan. This plan shall also incorporate locations for secure bicycle racks.

"E. Criteria for approval of site plan. The Commission may approve the site plan only after the Commission finds that the site plan is consistent with the approved concept plan and any other requirements included within its approval." (ROR, Item 75, pp. 920-21.)

is zoned for industrial use and (2) the area does not permit residential use. *Baker Residential, L.P.* v. *Berlin Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-06-4012368-S (September 10, 2008, *Cohn, J.*) (46 Conn. L. Rptr. 309, 310). "[I]f the commission establishes the applicability of the industrial zone exemption, it must only show that the reasons it cited are supported by sufficient record evidence. If, however, the industrial zone exemption does not apply, the commission must satisfy the heightened burden of proof set forth in part (1) of [§ 8-30g (g)]. As the industrial zone exemption is determinative of the commission's burden of proof and the scope of this court's review, its applicability must be determined at the outset. General Statutes § 8-30g (g) (2)." *Jordan Properties, LLC* v. *Old Saybrook Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-01-0508891-S (October 31, 2003, *Tanzer, J.*).

This court does not agree with the plaintiff that the commission opened the door to affordable housing in the LI-2 district simply by providing for the TODD and approving another development in it.[11] In amending § 8-30g to create the industrial exemption, "the legislature has explicitly identified a clear public interest, protecting industrial zones not permitting residential uses from affordable housing development that would drain their potential industrial development." *JPI Partners, LLC* v. *Planning & Zoning Board of the City of Milford*, Superior Court, judicial district of New Britain, Docket No. CV 99-0499081-S (April 9, 2001, *Frazzini, J.*) (29 Conn. L. Rptr. 524, 529), rev'd on other grounds, 259 Conn. 675, 791 A.2d 552 (2002). "[T]he evident intent of the legislature was to provide towns an alternative to the traditional

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[11] It is emphasized that the *only* evidence that residential uses are allowed in the LI-2 is the approval of the Orange Land Development application in the TODD zone.

three-part analysis under § 8-30g (g) (1) so that towns could protect their industrial development plans and safeguard a large tax base from forced conversion." *Baker Residential, L.P.* v. *Berlin Planning & Zoning Commission*, supra, 46 Conn. L. Rptr. 312. In *Baker Residential*, the court held that industrial zone exemption applied as the regulations did not allow a residential use and the land was in an industrial zone. Id., 313.

Here, the commission found and the record demonstrates that the subject property is in a LI-2 zone.[12] (ROR, Item 5, p. 23; Item 30, p. 70; Supp. ROR, Pl. # 107.00, Item 65, p. 4.) As previously stated, § 383-67 (A) of the regulations does not allow residential uses in the LI-2 zone; (ROR, Item 75, p. 822); and the plaintiff undisputedly did not apply to change the property's zone to the TODD zone. Therefore, assuming arguendo that the application falls under § 8-30g, the commission properly found that the industrial exemption applies.[13] (ROR, Item 75, p. 820.)

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[12] The plaintiff argues that the zoning map purports to show the area in which this property is located as LI-2 and "TODD eligible." (ROR, Item 64.) The plaintiff also asserts that the town's assessor cards indicated that the property is within the "LI-2 TODD" classification. (ROR, Item 60.)

[13] Under § 383-65, the permitted uses in the zone LI-2 zone are:

"A. Manufacture, processing or assembling of goods.

"B. Laboratories for research, testing and development; printing and publishing establishments.

"C. Office buildings for business and professional establishments, excluding those establishments which primarily provide services to customers and clients on the premises.

"D. Warehousing of goods or materials manufactured on the same lot or warehoused for distribution and sale or resale and wholesale business.

"E. Freight and materials trucking businesses when clearly accessory and subordinate to another permitted use on the same lot.

"F. Repairing and servicing of motor vehicles when clearly accessory and subordinate to another permitted use on the same lot.

"G. Public utility substations, telephone equipment buildings and switching stations; water supply pump stations and storage facilities; public utility transmission lines; public utility maintenance facilities.

"H. Buildings and facilities of the Town of Orange, State of Connecticut, and federal

In sum, the plaintiff's mixed use concept seems to be meritorious, realistic and appropriate for its location and zone.[14] Nevertheless, § 8-30g does not apply to mixed uses.[15] Additionally, the regulations expressly forbid residential uses in the LI-2 zone, the property is in the LI-2 zone and the plaintiff did not apply for a zone change to the TODD zone. Therefore, substantial

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government, excluding corporate or proprietary uses unless otherwise permitted above.

"I. Railroad rights-of-way and storage sidings.

"J. Signs as provided in Article XIX.

"K. Accessory uses customary with and incidental to any aforesaid permitted use, provided such accessory uses are located on the same lot with the use to which they are accessory; such uses may include, but are not limited to, off-street parking and loading spaces, and eating, recreation and auditorium facilities primarily for persons employed on the lot and not open to the general public." (ROR, Item 75, p. 820.)

[14] The commissioners described the plaintiff's proposal as "great," "fantastic," "lovely," "nice" and "beautiful." (Supp. ROR, Pl. # 106.00, Item 73.f, pp. 69, 74-75.) Counsel now agree that the Orange Land Development proposal will not be going forward. The record reflects that Orange has less than 2 percent affordable housing; (ROR, Item 11, p. 53); and that the plaintiff noted during the administrative process that further affordable housing development outside of the TODD zone is virtually impossible given existing zoning, affordable housing developments, infrastructure and the regulatory scheme. (Supp. ROR, Pl. # 106.00, Item 73.f, pp. 41-44.) Thus, the plaintiff's proposal may have been one of the few ways to provide more affordable housing stock in Orange.

[15] The language of § 8-30g demonstrates no intention by the legislature to address anything other than residential uses given a Euclidean zoning regime. It may be time for more flexibility as zoning has evolved since *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). See, e.g., *Farmington-Girard, LLC* v. *Planning & Zoning Commission of the City of Hartford*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-14-6055443-S (September 11, 2017, *Berger, J.*) (discussing in footnote that form-based zoning uses "physical form [rather than separation of uses] as the organizing principle for the code" that "are keyed to a regulating plan that designates the appropriate form and scale [and therefore, character] of development, rather than only distinctions in land-use types"), on appeal, Docket No. A.C. 41601; see also *Malafronte* v. *Planning & Zoning Board*, 155 Conn. 205, 209-10, 230 A.2d 606 (1967) ("Zoning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation and redevelopment. . . . The responsibility for meeting these demands rests, under our law, with the reasoned discretion of each municipality acting through its duly authorized zoning commission." [Citations omitted.]).

evidence supports the commission's denial. For these reasons, the plaintiff's appeal is dismissed.

Berger, J.T.R.